LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 27 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

———— term, 1961

No. 262

STOY DECKER and
ROBERT MATTHEW COX, - - - Petitioners,

versus

UNITED STATES OF AMERICA, - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RALPH H. LOGAN,
HARDY, LOGAN & TROSS,
506 West Jefferson Street,
Louisville 2, Kentucky,
Attorneys for Petitioners.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX.

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Statement	6
Reasons For Granting Writ	9
Conclusion	18
Appendix A	19
Appendix B	24

TABLE OF CASES.

	PAGE
Agnello v. U. S., 269 U. S. 20	12
Benge v. Comm. of Ky., 321 S. W. 2d 247	12
Brinegar v. U. S., 338 U. S. 160	12
Carroll v. U. S., 267 U. S. 132	12
Caudillo v. U. S., 253 F. 2d 513 (9th Cir.)	10
Chapman v. U. S., ___ U. S. ___, 81 S. Ct. 776	12
Decker and Cox v. U. S., No. 738; April 3, 1961, ___ U. S. ___, 81 S. Ct. 904	6–8
Harris v. U. S., 331 U. S. 145	12
Henderson v. U. S., 202 F. 2d 400	10
Louisville and Nashville Railway Co. v. Comm. of Ky., Ky., 35 S. W. 129	9
Minisky v. U. S., 131 Fed. 2d 614 (6th Cir.)	9

PAGE

Sonzinky v. U. S., 300 U. S. 506 10
State of Louisiana v. Masino, 216 La. 352, 43 S. W. 2d 685, 14 A. L. R. 2d 720 15
U. S. v. Delia; Tot v. U. S., 319 U. S. 463, 63 S. Ct. 1241 10
Yee Hem v. U. S., 268 U. S. 178 10

STATUTES.

PAGE

Conspiracy, 18 U.S.C. 371 1
Constitution of the United States, Fifth Amendment ..6, 24
Article I., Section 9 14
Jurisdiction, 28 U.S.C. 1254 2
National Firearms Act:
26 U.S.C. 5801 2
26 U.S.C. 5811 .....1, 2, 4, 7
26 U.S.C. 5841 .....1, 2, 4, 7
26 U.S.C. 5847 .....6, 24
26 U.S.C. 5848(5) 6, 24
26 U.S.C. 5851 .....1, 2, 3, 5, 7, 9, 14

OTHER AUTHORITIES.

PAGE

11 Am. Jur., Par. 348, p. 1176 14
11 Am. Jur., Par. 348, p. 177 15
Roberson's New Kentucky Criminal Law and Procedure, Second Edition, Section 92, page 145 9

IN THE

Supreme Court of the United States

————term, 1961

No. ————

STOY DECKER and
ROBERT MATTHEW COX, - - - *Petitioners,*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the ~~Fourth~~ Sixth Circuit, entered in the above entitled case on June 27, 1961. Such Judgment affirmed a conviction of Petitioners in the United States District Court for the Western District of Kentucky for Conspiracy, 18 U.S.C. 371, to violate 26 U.S.C. 5841 and 5851; to-wit, possess a firearm required to be registered by the Secretary of Treasury of the United States, together with certain identifying data, and to unlawfully receive or possess a firearm transferred in violation of 26 U.S.C. 5811, wherein each petitioner received a sentence of five (5) years;

and further affirming a sentence of five (5) years and $2,000.00 fine for each petitioner for knowingly and wilfully possessing a firearm transferred in violation of 26 U.S.C. 5811. The five (5) year terms to run concurrently.

OPINION BELOW.

The opinion of the Court of Appeals below is not yet reported and is attached hereto as Appendix A.

JURISDICTION.

The Judgment of the Court of Appeals was entered on June 27, 1961.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED.

1. Whether Petitioners can be guilty of criminal conspiracy: (a) To possess a firearm contrary to the National Firearms Act, 26 U.S.C. 5801, *et seq.*, when one Petitioner admits ownership and possession during time set forth in the overt acts specified in the indictment, and (b) to violate 26 U.S.C. 5841 and 5851.

2. Whether a conviction should be allowed to stand upon an indictment charging possession of a firearm on November 10, 1958, which allegedly had been transferred prior thereto in violation of 26 U.S.C. 5811 where testimony of a Treasury Department Agent clearly shows that the weapon, when transferred, was

not transferred in violation of 26 U.S.C. 5811 and was not determined by the Treasury Department to be a firearm until September 28, 1960.

3. Whether the Secretary of the Treasury, under the authority delegated to him by Congress, do an act that Congress is prohibited from doing, that is, issue an opinion, through an agent, and have its effect apply to a prior act, so as to make the act a felony.

4. Whether Federal authorities can use an article seized by city police, when the search was out of the presence of petitioner in connection with an arrest for drunkenness is valid (a) as an incident to a lawful arrest, (b) probable cause to make a search.

5. Whether use of same evidence in a Federal Court felony trial as was used for a conviction for conspiracy in a state court constitutes double jeopardy prohibited by the Fifth Amendment of the Constitution of the United States.

6. Whether the reference by the Federal District Attorney in the presence of the jury to a State Court trial of petitioners for a misdemeanor constitutes grounds for a new trial.

7. Whether 26 U.S.C. 5851 is unconstitutional as contrary to the Fifth Amendment of the United States Constitution and contrary to public policy.

STATUTES INVOLVED.

U.S.C., Title 26, Section 5811, "Tax":

"(a) Rate. There shall be levied, collected, and paid on firearms transferred in the United States a tax at the rate of $200.00 for each firearm:

"Provided, That the transfer tax on any gun with combination shotgun and rifle barrels, 12 inches or more but less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and on any gun classified as 'any other weapon' under section 5848(5), shall be at the rate of $5.00. The Tax imposed by this section shall be in addition to any import duty imposed on such firearm..

"(b) By whom paid. Such tax shall be paid by the transferor:

"Provided, That if a firearm is transferred without payment of such tax the transferor and transferee shall become jointly and severally liable for such tax. As amended September 2, 1958, Pub. L. 85-859, Title II, Section 203(b), 72 Stat. 1427; June 1, 1960, Pub. L. 86-478, Section 2, 74 Stat. 149.

"(c) How paid.

"(1.) Stamps. Payment of the tax herein provided shall be represented by appropriate stamps to be provided by the Secretary or his delegate."

U.S.C., Title 26, Section 5841, "Registration of persons in general":

"Every person possessing a firearm shall register, with the Secretary or his delegate, the number

or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation or which such person made, if provisions of this chapter applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68 A Stat. 725."

U.S.C., Title 26, Section 5851, "Possessing firearms illegally":

"It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812(b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury. As amended Sept. 2, 1958, Pub. L. 85-859, Title II, Section 203(h) (1), (2), 72 Stat. 1428."

Also involved are the following which are set forth in Appendix B:

Fifth Amendment to the Constitution of the United States;
26 U.S.C. 5848(5);
26 U.S.C. 5847.

STATEMENT.

A. The Facts.

On November 10, 1958, the Petitioneres were involved in a fracas wherein a tear gas gun was used. Among others, Petitioners were convicted in the Jefferson Circuit Court at Louisville, Kentucky, for a Conspiracy to do bodily harm to one Lloyd Alexander. The jury imposed a sentence of four (4) years in the county jail and a $2,500.00 fine against each of the Petitioners. Petitioners, after denial of certiorari by the Supreme Court of the United States (Stoy Decker and Robert Matthew Cox, petitioners v. Commonwealth of Kentucky, No. 738, April 3, 1961, 81 S. Ct. 904, —— U. S. ——, are presently serving said four year sentence from which there is no release or parole.

On November 10, 1958, the City Police of Louisville, Kentucky, took possession of the tear gas gun and it has been in possession of either City, State or Federal authorities ever since.

On September 30, 1960, petitioners, with another, were indicted by a Federal Grand Jury in the Western District of Kentucky for conspiring to possess the

same tear gas gun as above mentioned and for actual possession thereof. Aside from the Conspiracy statute, violation of 26 U.S.C. 5811, 5841 and 5851, that is possession of a firearm transferred, without the necessary tax having been paid thereon, and the failure to register the firearm as provided by Statute, was charged. 26 U.S.C. 5851 assigns guilt to whomever possesses a weapon as is described under the statutes unless explained to the satisfaction of a jury.

The Petitioner, Cox, admitted ownership and possession of the tear gas weapon, but denied knowledge of the statute or intent to violate it.

Petitioner, Decker, denied ownership or possession of the weapon.

Both Petitioners deny any conspiracy to possess the same.

The tear gas gun is a small hand affair known as as Model 40 and was manufactured by the Hercules Gas Munitions Corporation for firing gas fumes.

On September 28, 1960, an agent of the Treasury Department and of the Federal Bureau of Investigation in Washington, D. C. rigged up a holding device, put a .410 gauge shot gun shell into the little tear gas gun, put it all into the device, set up targets and pulled the trigger. The barrel of the tear gas gun did not rupture or explode and the Petitioners were automatically guilty under the Statute for having possessed the tear gas gun two years before, unless they could explain it all to the satisfaction of a jury.

The circumstances surrounding the search of the automobile wherein the tear gas gun was found are

set out in the District Court's finding of fact (R., Vol. 1, page 18a). The testimony of Officer Blevin as to former officer, Joseph, dead at the time of the trial, was out of the presence of the Petitioners and contrary to evidence given in the State Court trial.

The Treasury Agent's testimony is uncontradicted in that when the specific tear gas gun was sold by the manufacturer, no tax under 26 U.S.C. 5811 was required (R., Vol. 1, pages 40a-43a). In fact the requirement for payment of a tax on the "other weapons" category was not added to the Statute until 1958 (R., Vol. 1, page 57a).

The testimony of Mike Murphy (R., Vol. 2, pages 17b-19b) concerning a conversation he says he had with the Petitioner, Cox, in 1957, was out of the presence of the Petitioner, Decker, and did not identify the tear gas gun which was the subject of the indictment as the same gun Cox is said to have fired in 1957.

There is no testimony that Decker ever saw or knew of the tear gas gun in question prior to November 10, 1958.

The District Attorney, on Cross-examination of Petitioner, Decker, referred to testimony in a "State Case" in trying to contradict Decker's testimony in the present case (R., Vol. 1, pages 44a-45a). The "State Case" was a trial of a conspiracy charge using the same witnesses and testimony as in this case, and in Kentucky, a misdemeanor. Stoy Decker and Robert Matthew Cox, Petitioners v. Commonwealth of Kentucky, No. 738, April 3, 1961,—U. S.,—81 S. Ct. 904, certiorari denied.

REASONS FOR GRANTING WRIT.

I.

Section 5851, Title 26, United States Code, has never been held to be constitutional by the United States Supreme Court and decisions in other cases indicate that said section is in violation of the Fifth Amendment of the Constitution. Section 5851 provides the possession of a prohibited "firearm" is sufficient to authorize conviction "unless the Defendant explains such possession to the satisfaction of a jury."

The Statute sets no standards by which a jury shall determine what is a satisfactory explanation. The publicity these Petitioners had received prior to this trial would make any explanation fall on deaf ears. Under this Statute, possession is guilt. Those equally guilty, as are the thousands who have purchased similar tear gas guns, would be decided not by violation of the law but by the explanation, or excuse, given to the thousands of juries who would hear the cases.

Roberson's New Kentucky Criminal Law and Procedure, Second Edition, Section 92, beginning at page 145.

Louisville and Nashville Railroad Co. v. Commonwealth of Kentucky, 35 S. W. 129; Minisky v. United States, 131 Fed. 2d 614 (6th Circuit); 11 Am. Jur., Section 234, page 947.

The Court of Appeals cited the following cases in supporting the constitutionality of the Section:

Sonzinsky v. U. S., 300 U. S. 506. This case held valid the taxing authority of the act, not Section 5851.

Yee Hem v. U. S., 268 U. S. 178; Caudillo v. U. S., 253 F. 2d 513 (C. A. 9). These were narcotic cases and are clearly distinguished by U. S. v. Delia; Tot v. U. S., 319 U. S. 463, 63 S. Ct. 1241.

This Statute places the burden of proof upon the Defendant and requires him to explain to "satisfaction of the jury". To do this, Defendant *must* take the stand and could be required to give evidence against himself contrary to the Fifth Amendment.

It is respectfully submitted that this question alone is sufficient to justify a hearing by this Court.

II.

The Court of Appeals saw no error in the introduction of evidence of a State Court trial. The United States Attorney in his cross-examination of the Petitioners on more than one occasion referred to testimony in a State Court case in an effort to contradict the witness. This is prejudicial error. The Defendants objected. The Court did not admonish the jury on the question of admissibility as to credibility of the witness. The decisions that hold where a Defendant takes the stand in his own defense waives immunity from cross-examination and like other witnesses is subject to impeachment as to credibility, Henderson v. U. S., 202 F. 2d 400 (C. A. Tenn.), should be limited where defendant *must* take the stand to "explain to the satisfaction of a jury." In fact, contrary to the

Court of Appeals' observation, it is the right of the Defendant not to take the stand that is violated. The United States Attorney cross-examined about many questions not connected with the case at bar, and not presented on direct examination. The cross-examination was prejudicial.

The United States Attorney on cross-examination, asked about a $1,500.00 check. At the next term of Court these Petitioners were indicted under the Landrum-Griffin Amendment to the National Labor Relations Act for mishandling this same $1,500.00 check. The Question (R., Vol. 1, page 44a) on cross-examination—"I see. So you just gave him $1,500.00. As a matter of fact this fund itself was a special fund that came down from Jimmy Hoffa in July, was it not." The objection was sustained, but the damage was done, and there was no admonishment from the Court.

III.

The facts in this case to prove possession of the tear gas pistol, and conspiracy to do so, are the same facts by the same witnesses, which resulted in a conviction for a Conspiracy to do bodily harm in a Kentucky Court. _To years after the Kentucky violation the Federal authorities found a way to use these same witnesses and facts to fit a violation of a Federal law. It is hard to believe it was ever intended that the decisions of the Supreme Court on the question of Double Jeopardy should be used in this manner, no matter the reputation of the defendant.

IV.

The authorities cited by the District Judge have been questioned by later opinions of the Supreme Court which appear to support the opinion of the Court of Appeals of Kentucky in Benge v. Commonwealth of Kentucky, Ky., 321 S. W. 2d 247, wherein it refused to accept the ruling in Harris v. U. S., 331 U. S. 145, and followed the dissent therein.

Chapman v. U. S., —— U. S. ——, 81 S. Ct. 776, leaves open to question and further review the decision as to search in this case as the District Judge relied on Agnello v. U. S., 269 U. S. 20; Harris v. U. S., 331 U. S. 145; Carroll v. U. S., 267 U. S. 132; Brinegar v. U. S., 338 U. S. 160, for his conclusions of law, some of which appear to be overruled by Chapman v. U. S.

V.

It is presumed that the Secretary of the Treasury is permitted to conduct testings of various instruments to determine if they are firearms. The argument here is whether or not the Secretary, by making such tests, and determining that a particular instrument is a firearm can give effect to that test to carry it back for the whole life of the designated firearm. The Treasury Department has, by statement to the manufacturer of the gun, the Hercules Gas-Munitions Corporation, told the manufacturer that the Model 40 tear gas gun was not a firearm and was not subject to tax therefor. The test of whether or not a tear gas gun such as the one

in this case is a firearm is whether or not particular commercial shot ammunition can be fired in it without its exploding.

Mr. James Gordon of the Hercules Gas-Munitions Corporation, testified that his company manufactured approximately 5,000 tear gas guns a year (R., Vol. 1, page 47a), and that the company had been in business to the knowledge of this particular witness since 1928 (R., Vol. 1, page 46a). From 1928 to the time of the testimony in November, 1960, the Hercules Gas-Munitions Corporation had never been required to pay any tax of any kind on the manufacture of its articles (R., Vol. 1, page 48a). The Hercules Gas-Munitions Corporation changed its method of manufacturing tear gas guns at the request of the Treasury Department, but this was after the sale of the Model 40 gun in issue. The tear gas gun in this case was sold to the Royce's Gun Shop in Madison, Indiana on April 4, 1956 (R., Vol. 1, page 49a).

Counts Two and Three of the indictment are based upon knowingly and willfully possessing a firearm, weapon or device which had been transferred in violation of 5811, Title 26, United States Code. The only provisions of 5811 of the Code is the requirement to pay a tax. At the time the tear gas gun in this case was sold, no tax was required, by direct statement of the Treasury Department, on type Model 40. The Treasury Department has now said that the gun in question on September 28, 1960 was determined to be a firearm and to make this indictment stand must likewise say that a tax should have been paid on it under

the provisions of Section 5811 prior to its sale in April, 1956. It is Defendants' contention that the determination by the Department in September, 1960 could not make possession of this gun in November, 1958, or at any time prior to September 28, 1960, a violation of Section 5851, Chapter 26, United States Code.

The Constitution of the United States contains a provision against the enactment of Ex Post Facto Laws by Congress, U. S. Constitution, Article I, Section 9. 11 Am. Jur., Paragraph 348, page 1176, lists definitions of Ex Post Facto Laws as declared by the Supreme Court of the United States: They are:

> "(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal and punishes such actions;
>
> (2) Every law that aggravates a crime, or makes it greater than it was when committed;
>
> (3) Every law that changes the punishment and fixes a greater punishment than the law annexed to the crime when committed;
>
> (4) Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. An Ex Post Facto Law has also been defined as a law which punishes that which was innocent when done, which adds to the punishment of that which was criminal, which increases the malignity of a crime, or which narrows the rule of evidence, so as to make conviction more easy."

In the State of Louisiana v. Masino, *et al.*, 216 La. 352, 43 So. 2d 685, 14 A. L. R. 2d 720, the Court said:

> "A general rule of law for the punishment of offenses which endeavor to reach by its retrospective operation acts previously committed as well as to prescribe rules of conduct for situations in the future is void insofar as it is retrospective, but invalidity will not affect its operation in the future. Quoting Jahne v. New York, 128 U. S. 189. This General Rule is applicable to the instant case."

Further quoting from Am. Jur., *supra*, we find the following language on page 177:

> "The early definition as set up by the Supreme Court, has been modified to some extent by the later decisions which define an Ex Post Facto Law as one which, in its operation, makes that criminal which was not so at the time the action was performed, or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage."

Numerous cases are cited in support of the foregoing. It is respectfully submitted that the Secretary of the Treasury or his Delegate cannot do, under the authority of a Statute, what the Congress cannot do.

The Government's witness, Thurman W. Darr, Assistant Chief of the Firearms Section, Internal Revenue Service, United States Treasury Department, Washington, D. C. (R., Vol. 1, page 33a) testified, upon cross-examination (R., Vol. 1, page 49a), that the

Treasury Department on March 30, 1956 had directed a letter to the Hercules, G. M. Corporation, 5501 North Broadway, Chicago 40, Illinois, wherein a ruling was made by the Treasury Department that Model 30, 35 and 40, Tear Gas Pen Guns had been submitted for testing and that the devices were not considered to be firearms subject to the provisions of the National Firearms Act, and that a previous ruling of July 16, 1952 to the same effect was sustained.

Mr. Darr (R., Vol. 1, page 42a) testified that the letter of July 16, 1952 concluded with the statement that the Hercules Company was not required to pay tax on tear gas guns. Mr. Darr further testified (R., Vol. 1, page 43a) that the 1956 letter referred to the testing of a Model 40 tear gas gun. Upon the tear gas gun, the object of the indictment, being presented to Mr. Darr, he acknowledged that it was a Model 40.

Upon cross-examination, Mr. Darr was asked the question, "Did I understand you to testify that you say this Government Exhibit 2 was determined to be a firearm after you tested it?" The answer was "Yes Sir," and upon being asked the date of the test, the answer was September 28, 1960. He was further asked, "Had this instrument, Government Exhibit 2, been classified as a firearm on November 9th between the hours of 12:30 to 2:30 on November 10, 1958?" The answer was, "Not to my knowledge, no sir" (R., Vol. 1, page 36a). Upon further examination, Mr. Darr (R., Vol. 1, pages 40a, 41a) was asked the question, "Now, I understand since the letter written in 1956, the first time these guns have been described as a

firearm was on September 28, 1960?" Answer, "The first time to my knowledg that gun was described as a firearm." Question, "Well in 1956, the letter says the ones you fired were not firearms did you not?" Answer, "Those models as submitted, that's right." Question, "Now, that's the letter you were referring to in your testimony a moment ago, was it not?" Answer, "Yes Sir." Question, "Now would you—how would the owner of this instrument know whether or not it should or should not be registered?" Answer, "Only by use, I would imagine." Question, "Do you mean the man would have to possess it and use it to know whether or not it could be used and required to be registered, that's your opinion?" Answer, "I don't know how else he'd know." Further in Mr. Darr's testimony (R., Vol. 1, page 43a) he was asked: Question, "I'll ask you, sir, if there is any way of anybody in the United States has to know, until you testified here today, that this gun was classified as being required to be registered under the National Firearms Act?" Answer, "The Company that made it, knew it." Question, "When did you tell them?" Answer, "Told them in 1952 that the devices they submitted were not to be registered because they were *not* firearms." (Emphasis Supplied.) Question, "In 1956 they were told again they were not firearms." Answer, "That's right, the devices as submitted." Question, "I'm saying-yeh. How would anybody know that they should be registered—Well I believe you answered that. You said you just have to shoot it to tell, didn't you?" Answer, "*That's right.*" (Emphasis Supplied.)

VI.

The conspiracy fails, in this case, if the aforementioned is upheld. Here there was no conspiracy nor could there have been.

CONCLUSION.

It is respectfully submitted that for the reasons hereinbefore set out, the Petition for a Writ of Certiorari should be granted in this case.

RALPH H. LOGAN,
HARDY, LOGAN & TROSS,
506 West Jefferson Street,
Louisville 2, Kentucky,
Attorneys for Petitioners.

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 14436

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

STOY DECKER and
ROBERT MATTHEW COX, - - *Defendants-Appellants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY.

OPINION —Decided June 27, 1961;
Filed June 27, 1961.

Before: MARTIN, McALLISTER and WEICK, Circuit Judges.

WEICK, Circuit Judge. Cox and Decker were convicted by a jury in the District Court on an indictment charging them, in the first count, with conspiracy to possess a firearm required to be registered by the Secretary of the Treasury which had been transferred in violation of law, and, in other counts, with the substantive offense of possession of said firearm. Title 18 U. S. C. § 371; Title 26 U. S. C. §§ 5841, 5851.

The weapon in question was a tear gas gun. The difference between this gun and the conventional tear gas pencil is that the pencil usually fires a much smaller container of gas. There was no question but that the weapon had

not been registered with the Secretary and had been transferred without payment of the tax.

Cox admitted at the trial that he was the owner of and in possession of the tear gas gun. The evidence disclosed that Cox, Decker and others met at a bar in Louisville, Kentucky and assaulted one Lloyd Alexander. Cox fired the tear gas gun in Alexander's face.

The principal question raised in the appeal was whether the tear gas gun was a firearm within the meaning of the statute.

The term "firearm" is defined by the statute as follows:

> "For purposes of this Chapter:
>
> (1) Firearm--the term firearm means a shotgun or rifle having a barrel of less than 18 inches in length, or any other weapon except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person. . . .
>
> (5) Any other weapon--the term 'any other weapon' means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive but such term shall not include pistols or revolvers or weapons designed, made or intended to be fired from the shoulder and incapable of being fired with fixed ammunition." Title 26 U. S. C. § 5848.

The Government claimed that the tear gas gun was covered under the category of "any other weapon." It was undisputed that it could be concealed on the person. If the weapon could discharge a shot through the energy of an explosive, then it was covered by the statute. In other words, a tear gas gun capable only of discharging tear gas would not be considered as a firearm. It was a firearm

only if it could discharge a shot through the energy of an explosive.

Thurmond W. Darr, Chief of the Firearm Section, Internal Revenue Service testified that he and Marion E. Williams, Federal Bureau of Investigation's ballistics expert test fired the weapon in Washington, D. C. on September 28, 1960. They used as ammunition a .410 gauge shotgun shell which was commercial ammunition purchased on the open market. Darr gave the results of the test which were that the gun fired the shot and that the firing did not rupture the barrel of the gun or cause any structural damage thereto. In his opinion, the tear gas gun was a firearm within the meaning of the statute.

There was no evidence to contradict Mr. Darr's testimony.

Appellants urge that they did not know that the weapon was a firearm within the meaning of the statute and that it could not be ascertained from visual examination without test firing the gun. They insist that the element of criminal intent is lacking.

With respect to Cox, the testimony of Michael S. Murphy tended to prove that he had such knowledge. Murphy related a conversation with Cox in 1957 in which Cox told him that he had on one occasion fired a .410 shotgun shell in the weapon and that the recoil almost tore his hand off.

The statute makes the mere possession of an unregistered firearm transferred in violation of law an offense. If an accused possesses such firearm, the offense is complete. It is not necessary for the Government to prove that the defendant knew that the weapon in his possession was a firearm within the meaning of the statute. Scienter is not involved. *United States* v. *West*, 148 F. Supp. 202 (D. C. Ohio, 1957).

There was substantial evidence to show that Decker also had possession of the weapon at one time.

Appellants urge that an accused cannot be guilty of a conspiracy to possess a firearm which he admits he owns and possesses and that it is not possible to conspire to violate the firearms statute.

The sentences in the present case were concurrent. Since the substantive offense of possession was established free from error, it is not necessary for us to consider the claims of error relating to the conspiracy count.

Appellants further claim that there was an unlawful search by state policemen of an automobile in which the appellants had been riding as a result of which the tear gas gun was found under the front seat. A motion to suppress the evidence was heard and denied by the District Judge. He adopted findings of fact and conclusions of law. The testimony at the hearing was not transcribed. We can only consider the findings of fact and conclusions of law as the evidence is not before us. The District Judge found that the search was incident to a lawful arrest and that there was probable cause for the search. He concluded that the search was lawful and denied the motion to suppress citing *Agnello* v. *United States*, 269 U. S. 20; *Harris* v. *United States*, 331 U. S. 145; *Carroll* v. *United States*, 267 U. S. 132; *Brinegar* v. *United States*, 338 U. S. 160.

The facts as found by the District Judge cannot be questioned here. His conclusions of law were correct and are supported by the authorities which he cited.

Finally, it is claimed that Title 26 U. S. C. § 5851 is unconstitutional in violation of the Fifth Amendment. It is asserted that the provision "whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction,

unless the defendant explains such possession to the satisfaction of the jury" is too indefinite.

The National Firearms Act has been upheld by the Supreme Court as a valid exercise by Congress of its taxing power. *Sonzinsky* v. *United States*, 300 U. S. 506. In our judgment, the statute is sufficiently definite. The fact that it contains a provision permitting the defendant to explain his possession to the jury does not invalidate the statute. Cf. *Yee Hem* v. *United States*, 268 U. S. 178; *Caudillo* v. *United States*, 253 F. 2d 513 (C. A. 9). We think that an accused would have a right to explain his possession even without such a statutory provision.

Other errors are claimed which we deem are without merit.

The judgment is affirmed.

APPENDIX B.

Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

26 U.S.C. 5847:

> "The Secretary or his Delegate shall prescribe such regulations as may be necessary for carrying the provisions of this Chapter into effect. August 16, 1954, 68 A. Stat. 726."

26 U.S.C. 5848(5):

> "(5.) Any other weapon. 'The term any other weapon' means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, but such term shall not include pistols or revolvers or weapons designed, made or intended to be fired from the shoulder and not capable of being fired with fixed ammunition."

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	3
Argument	5
Conclusion	11

CITATIONS

Cases:	
Abbate v. *United States*, 359 U.S. 187	10
Brinegar v. *United States*, 338 U.S. 160	10
Carroll v. *United States*, 267 U.S. 132	10
Casey v. *United States*, 276 U.S. 413	6
Hirabayashi v. *United States*, 320 U.S. 81	11
Lawn v. *United States*, 355 U.S. 339	11
Petite v. *United States*, 361 U.S. 529	10
Sonzinsky v. *United States*, 300 U.S. 506	6
Yee Hem v. *United States*, 268 U.S. 178	6
Statutes:	
National Firearms Act:	
26 U.S.C. 5811(a)	2
26 U.S.C. 5841	2
26 U.S.C. 5851	3, 5, 6
Miscellaneous:	
Rev. Rul. 55–529, 1955–2 Cum. Bull. 482	7
Rev. Rul. 56–29, 1956–1 Cum. Bull. 552	7
Statement of Attorney General Homer S. Cummings, Hearings before the House Committee on Ways and Means on H.R. 9066, 73d Cong., 2d Sess., pp. 8–9	6

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 262

STOY DECKER AND ROBERT MATTHEW COX, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 19–23) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1961. The petition for a writ of certiorari was filed on July 27, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners, who were convicted of possessing an illegally transferred firearm, have standing to complain of the constitutionality of a provision of the statute making possession sufficient evidence to

authorize a conviction unless explained by the defendant to the satisfaction of the jury, where the conviction did not rest upon this provision but upon adequate independent proof of all elements of the offense.

2. Whether, in any event, the statutory provision making possession sufficient to support a conviction, unless explained by the defendant, is valid.

3. Whether the government was precluded from introducing evidence to show that the weapon involved was a firearm within the meaning of the National Firearms Act because the Treasury Department had ruled that a later modified model of the weapon was not such a firearm.

4. Whether the district court properly denied a motion to suppress evidence seized in the course of a lawful arrest.

5. Whether a federal prosecution for possessing an illegally transferred firearm and for conspiracy constitutes double jeopardy after a state conviction of assault, with intent to do great bodily harm, based on the events in which the firearm was used.

6. Whether there was error in the cross-examination of one of the petitioners.

STATUTES INVOLVED

26 U.S.C. 5811(a):

> There shall be levied, collected, and paid on firearms transferred in the United States a tax at the rate of $200 for each firearm: * * *

26 U.S.C. 5841:

> Every person possessing a firearm shall register, with the Secretary or his delegate, the

number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof. No person shall be required to register under this section with respect to a firearm which such person acquired by transfer or importation or which such person made, if provisions of this chapter applied to such transfer, importation, or making, as the case may be, and if the provisions which applied thereto were complied with.

26 U.S.C. 5851:

It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of sections 5811, 5812(b), 5813, 5814, 5844, or 5846, or which has at any time been made in violation of section 5821, or to possess any firearm which has not been registered as required by section 5841. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury.

STATEMENT

The first count of an indictment returned in the District Court for the Western District of Kentucky charged petitioners and Floyd Guinn with conspiracy to possess an unregistered firearm which had been transferred in violation of law. Counts 2 and 3

charged petitioners Decker and Cox, respectively, with the substantive offense of possession of a firearm which had been transferred in violation of 26 U.S.C. 5811 (P.A. 7–9).[1] Petitioners were convicted after a jury trial and they were each sentenced to imprisonment for five years on count 1 (the conspiracy count) and to imprisonment for five years and to pay a fine of $2,000 for the substantive offense, the sentences to run concurrently (P.A. 3).[2]

The evidence may be summarized as follows:

On November 10, 1958, in Louisville, Kentucky, petitioners and others assaulted one Lloyd Alexander. Cox fired the weapon involved, described as a tear gas gun, in the victim's face and shortly thereafter gave the weapon to Decker. Decker and Guinn were arrested by city police officers as they fled from the area in a car. The weapon was found by the police under the seat where Decker had been riding. At the trial, Cox admitted ownership and possession of the weapon (Pet. 7, 20).[3]

There was no question that the weapon had not been registered with the Secretary of the Treasury and had been transferred without payment of the tax required by the National Firearms Act (Pet. 19–20). Thurmond W. Darr, Chief of the Firearms Section,

[1] The record on file with the Clerk consists of the appendices to the briefs filed in the court of appeals. Petitioner's appendix will be designated herein as "P.A." and the government's as "G.A.".

[2] Guinn was acquitted by the court (P.A. 2).

[3] These facts are not reflected in the partial transcript or the appendices filed in this Court but were undisputed in the court below (see Pet. 20).

Internal Revenue Service, and Marion E. Williams, a Federal Bureau of Investigation ballistics expert, test-fired the weapon on September 28, 1960, using commercial ammunition (a 410 gauge shotgun shell), without any damage to its structure (G.A. 3–7). Darr testified that as a result of the test it "is the position of the Internal Revenue Service that the tear gas pen gun, G2576, that we test-fired is a firearm under the National Firearms Act in 'Any Other Weapon' category" (G.A. 7). There was also testimony that petitioner Cox had stated some time in 1957 that he had fired a "410 gauge shotgun shell in a tear gas pistol and the recoil of it almost tore his hand off" (G.A. 18).

The weapon was one of a type known as a Model 40 tear gas pen gun, which the Treasury Department had originally decided was a firearm under the National Firearms Act because it was capable of firing fixed ammunition without exploding. This type of gun was subsequently modified by the manufacturer by placing grooves in the barrel, causing it to explode when fired with ammunition (G.A. 10–11). Since this altered version, as distinguished from the weapon involved in this case and the original model, would not fire fixed ammunition, the Treasury Department, on March 30, 1956, ruled that it was not subject to the provisions of the statute (P.A. 40; G.A. 11).

ARGUMENT

1. The statute (26 U.S.C. 5851, *supra*, p. 3) provides that it shall be unlawful for any person to receive or possess any firearm which has at any time

been transferred in violation of Section 5811, *i.e.*, without payment of the transfer tax of $200. Section 5851 also provides that when "the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury".

Petitioners contend (Pet. 9–10) that this latter provision is unconstitutional because it "sets no standards by which a jury shall determine what is a satisfactory explanation" and because it places the burden of proof upon the defendant and requires him to give evidence against himself. These arguments, not raised in the district court, are without merit. In the first place, the charge here was possession of an unregistered firearm on which the transfer tax had not been paid; there was no question that the weapon had been transferred without payment of the tax, and the evidence affirmatively showed petitioners' knowing possession of the gun. No more need be proved for this offense. The convictions, therefore, do not rest upon the provision claimed to be invalid. Secondly, there is no constitutional infirmity in this type of provision. *Yee Hem* v. *United States*, 268 U.S. 178; *Casey* v. *United States*, 276 U.S. 413.[4]

[4] In *Sonzinsky* v. *United States*, 300 U.S. 506, this Court held that the National Firearms Act is a valid exercise of the taxing power of Congress. The provision making possession *prima facie* evidence of guilt follows the language of the Narcotic Drug Act of 1909 which was sustained in the *Yee Hem* case, *supra*, over precisely the same objections as petitioners make here. See Statement of Attorney General Homer S. Cummings, Hearings before the House Committee on Ways and Means on H.R. 9066, 73d Cong., 2d Sess., pp. 8–9.

2. Petitioners do not deny that a weapon such as the one involved here is a firearm subject to the provisions of the statute if it is capable (as it was) of firing fixed ammunition without exploding.[3] They contend (Pet. 12–17) that no tax was due when the gun was transferred because the Treasury Department had ruled that a gun of the same model number was not a firearm, and that they were therefore subjected to an *ex post facto* application of the statute. They do not argue that they relied upon the ruling in acquiring the gun. Petitioner Cox is in no position to complain on this score, for there was evidence that he had himself fired fixed ammunition from the gun (*supra*, p. 5).

In any event, the contention is based upon a misconception of the facts. The gun petitioners possessed was one of an original model which had never been determined not to be a firearm. On the contrary, the manufacturer was informed by the Treasury Department that this model was a firearm. Subsequently, the manufacturer modified the model by placing grooves in the barrel, causing it to explode when fired with fixed ammunition (G.A. 11). It was this modified model that was the subject of the determinations upon which petitioners rely (see p. 5, *supra*).

[3] The Treasury Department classifies such tear gas firing devices as firearms if they are capable of firing fixed metallic cartridges in shotgun shells. If they are not capable of firing such ammunition, they are not considered to be firearms. Rev. Rul. 55–529, 1955–2 Cum. Bull. 482 (G.A. 20); Rev. Rul. 56–29, 1956–1 Cum. Bull. 552 (G.A. 21).

Moreover, a determination by the Treasury Department is not a prerequisite to the application of the statute. If a device is a firearm, there must be compliance. Otherwise no device would be within the coverage of the Act without a prior administrative ruling—a prerequisite which Congress did not impose. As the court of appeals held, it was not necessary to prove that petitioners knew the weapon was a firearm under the statute, if they knew (as they did) what it physically was (Pet. 21).

3. Before trial, petitioners moved to suppress the gun as evidence. They contend that the district court erred in denying the motion (Pet. 12). Only the findings of fact and conclusions of law of the district court were made part of the record on appeal; the evidence adduced at the hearing on the motion was not transcribed. Accordingly, the findings cannot be questioned. The court found that the local police officers were informed by radio that a gas gun had been used in a fight in a bar. When they arrived on the scene, the owner of the bar, a former police officer, pointed to a car leaving the area, told the officers the men who were in the fight were in it, and gave them the license number. In their pursuit, the officers saw the car weaving from side to side. As they were stopping it, they saw petitioner Decker bend over in his position in the right front seat. Guinn was driving. Both were intoxicated. They were taken in their car to the hospital where the victim of the assault had been removed for treatment. Guinn testified that he and Decker voluntarily went with the officers. At the hospital, after verifying the

information that a person had been shot with a gas gun, the officers questioned the two men. They denied that they were involved in the fight and denied knowing anything about a gas gun. They were placed under arrest for drunkenness. After searching them in the entrance or vestibule of the hospital, one of the officers went to their car, which was parked about twenty or twenty-five feet from the entrance, searched it, and found the gun, a hunting knife, and a partially filled bottle of whiskey. On these facts, the district court held that the search was a lawful incident of a lawful arrest (P.A. 18–20) and its ruling was sustained by the court of appeals (Pet. 22).

There can hardly be any question as to the validity of the arrests. Guinn and Decker were fleeing in their car from the scene of the fight, the owner of the bar identified them to the officers as participants, their car was weaving in the street, and the officers saw Decker bend over in his seat when the car was brought to a stop. It was entirely reasonable for the officers to take the men to the hospital to verify the information they had received that a man had been shot with a gas gun. In these circumstances, there was ample probable cause for the arrests. And in the light of the positive information the officers then had as to the shooting and their prior observations of Decker's movements in the car when they stopped it, they had reason to believe that the gun used in the fight was secreted in the car standing nearby. They were therefore justified in searching the car, both for their own self-protection and to find the instrumentality of the

offense. Cf. *Brinegar* v. *United States*, 338 U.S. 160; *Carroll v. United States*, 267 U.S. 132.

4. Contrary to petitioners' contention (Pet. 11), no double jeopardy is involved in this federal prosecution following upon their conviction in a state court, with others, of conspiracy to do bodily harm to the victim of the assault (see Pet. 6). *Abbate* v. *United States*, 359 U.S. 187. Obviously, a conspiracy to do bodily harm to a person is one thing; illegal possession of a gun in violation of the National Firearms Act is quite another.[6]

5. Petitioners contend generally (Pet. 10–11) that the trial court erred in permitting government counsel, in cross-examining them, to refer to "testimony in a state court case in an effort to contradict the witness." They cite only one question put to petitioner Decker concerning his testimony "in state court" that he had the gun after petitioner Cox had testified in the same proceeding that he had turned it over to Decker (Pet. 8; P.A. 45).[7] We fail to see any impropriety in such questions. Petitioners were subject to cross-examination on the basis of their prior state-

[6] By the same token, this prosecution is entirely consistent with the policy of the Department of Justice against duplicating federal-state prosecutions. See *Petite* v. *United States*, 361 U.S. 529, 531. The two prosecutions involved here did not arise out of the same transaction; the state offense merely revealed the fact that petitioners possessed an unregistered firearm in violation of the federal statute.

[7] In connection with this contention, petitioners also refer a question put to petitioner Decker concerning his disposition of $1,500, and government counsel's reference to a "special fund that came down from Jimmy Hoffa" (Pet. 11; P.A. 44). But, as petitioners themselves acknowledge (Pet. 11), the trial court ruled that this line of questioning had nothing to do with "this case" and accordingly sustained their objection (P.A. 44–45).

ments, whether they were made in or out of court. The reference to the "state court" only served to identify the statement to which government counsel was referring. The nature of the proceeding in the state court was not mentioned (cf. Pet. 8).*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
ROBERT S. ERDAHL,
SIDNEY M. GLAZER,
Attorneys.

AUGUST 1961.

---

* Petitioners also assert, without supporting argument, that they could not be guilty of both a conspiracy and the substantive offense, in view of petitioner Cox's admission that he owned and possessed the gun, and that it is not possible to conspire to violate the National Firearms Act as charged in the indictment (Pet. 2, 18). Apart from the fact that these contentions are frivolous as we understand them, we point out that petitioners' sentences on the conspiracy count are concurrent with the sentences on the substantive counts. Hence, any infirmity in the former is of no consequence. *Lawn* v. *United States*, 355 U.S. 339, 359; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.

U.S. GOVERNMENT PRINTING OFFICE 1961